DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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Washington D.C. 20002

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. BRENDA SMITH Respondent	Case No.: I-00-40049

FINAL ORDER

I. Introduction

Respondent Brenda Smith operates a licensed child development facility out of her home located at 4626 4th Street, NW in Washington, D.C. By Notice of Infraction (No. 00-40049) served on May 31, 2000, the Government charged Respondent under the Civil Infractions Act of 1985 (D.C. Code §§ 6-2701, *et seq.*) with five violations of Title 29 of the District of Columbia Municipal Regulations ("DCMR"). The Government alleged that Respondent violated 29 DCMR 327.5 by failing to meet natural light and ventilation requirements; 29 DCMR 330.3 by failing to keep dangerous substances out of the reach of children; 29 DCMR 326.2 by failing to maintain accurate contact information on parents; 29 DCMR 318.1 by failing to properly store and protect food; and 29 DCMR 306.1(b) by failing to comply with other applicable federal or District law. The Notice of Infraction charged that the alleged infractions occurred on May 24, 2000 and sought total fines in the amount of $1,250.00.

Respondent failed to answer or otherwise respond to the Notice of Infraction within twenty (20) calendar days[1] as required under D.C. Code § 6-2712(f) and as instructed on the Notice of Infraction. As a result, a default order was issued against Respondent resulting in assessment of a statutory penalty in the amount of $1,250.00, pursuant to D.C. Code § 6-2704(a)(2)(A).

Respondent subsequently filed an untimely answer to the Notice of Infraction. She entered pleas of Deny to the charges alleged under 29 DCMR 327.5, 330.3, and 326.2, and entered pleas of Admit with Explanation to the charges alleged under 29 DCMR 318.1 and 306.1(b). Respondent also filed a submission asserting, *inter alia*, that her child development facility was closed on the date of the alleged infractions, and that she was therefore exempt from otherwise applicable regulations. On June 29, 2000, this administrative court issued an order permitting the Government to reply to Respondent's submission. No response was filed.

An evidentiary hearing on the merits was held with regard all contested issues. The charging inspector, Maureen Ryan, appeared for the Government and Respondent appeared *pro se*. Various exhibits were admitted into evidence.[2] Ms. Ryan, Brenda Smith, and Respondent's husband, Zevane Smith, testified during the hearing. The record is now closed and this matter is ripe for decision.

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[1] A Respondent is permitted fifteen calendar days to respond to a notice of infraction plus an additional five days when served by mail. D.C. Code §§ 6-2712(e) and 6-2715.

[2] Petitioner's Exhibits 1-6 ("PX-1, PX-2, PX-3, PX-4, PX-5, and PX-6") and Respondent's Exhibit 9 ("RX-9") were admitted without objection. Respondent's Exhibits 7 and 8 were marked, but subsequently withdrawn.

II. Summary of the Evidence

The Government alleges that on May 24, 2000, Respondent's child development facility was open for business and operating in violation of each of the charged regulations. Respondent replies that her child development facility was closed on May 24, 2000, and therefore not subject to otherwise applicable regulatory requirements. Most of the evidence offered at trial centered on this single issue.

Title 29 of the District of Columbia Municipal Regulations provides the principle regulatory framework through which the District of Columbia safeguards the health and safety of children placed in licensed childcare facilities. In explaining her defense, Respondent testified that she gave advanced notice of her intent to close on May 24, 2000 to the parents of each enrolled child. She testified that despite her closure notice, two parents who regularly utilized her facility "begged" her to take care of their children on that date because of each parent's educational commitments. Respondent maintains that the care she provided to those two children, Qu'Ran Hughes and Nigel Payne, was a "personal favor to the parents," and not a part of her operation of a regulated child development facility. In further support of her case, Respondent testified that she should not be liable for a failure to maintain parental contact information for Qu'Ran Hughes and Nigel Payne in violation of 29 DCMR 318.1 because she had a current phone number for the high school attended by their mothers.[3]

[3] The testimony of Zevane Smith was consistent with Respondent's testimony and largely cumulative of it.

The charging inspector, Maureen Ryan, testified to the conditions of the child development facility during her May 24 inspection and asserted that Respondent's facility appeared to be open for business. She further testified that Respondent failed to inform the Department of Health[4] of any planned change in her facility's operating hours on May 24, 2000. The Government argued that as a regulatory matter, the facility could not be deemed closed without such notification. The Government alternatively asserted that whether or not the Department of Health received notice, the fact that Respondent accepted Qu'Ran Hughes and Nigel Payne[5] into her care on that day negated any purported closure during the facility's normal operating hours.

With regard to the infraction charged under 29 DCMR 318.1, Ms. Ryan testified that Respondent failed to maintain sufficient parental contact information because she lacked direct telephone or pager numbers with which to reach Qu'Ran's and Nigel's mothers.

As to the matter of Respondent's untimely answer and statutory penalty under D.C. Code § 6-2712(f), Respondent moved to vacate the default penalty based upon a claim of good cause. Respondent asserts that she was out of town attending a funeral for a period of approximately

[4]The Mayor's authority to regulate child development facilities was delegated to the Department of Health by Reorganization Plan No. 4 of 1996, Mayor's Order No. 97-42, and Mayor's Order No. 99-68.

[5] It is undisputed that at all relevant times, Qu'Ran Hughes and Nigel Payne were enrolled in and regularly attended Respondent's child development facility during its normal operating hours.

fourteen (14) days near the time the Notice of Infraction was served, and that she promptly responded once she learned of it. The Government did not challenge these representations.

III. Charges Dismissed

29 DCMR 327.5 - Failure to Meet Light and Ventilation Requirements

Respondent was charged under 29 DCMR 327.5[6] with failing to maintain light and ventilation requirements purportedly imposed by an unidentified section of the District of Columbia Building Code (DCMR Title 12). The Government did not, however, provide any citation to the building code provision it asserts was violated. The administrative court must therefore dismiss this charge because it is legally insufficient to provide Respondent with adequate notice of the charge alleged against her and an opportunity to defend against it.

As this administrative court has ruled previously, the Civil Infractions Act of 1985 and the Due Process Clause of the Fifth Amendment require that respondents be provided with full and fair notice of any charges brought against them and a reasonable opportunity to prepare a defense. *E.g.,* D.C. Code § 6-2711(b); *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *In re Gault,* 387 U.S. 1, 33-34 (1967); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). The Government cannot rely (as it has here) on a catchall regulation with a general cross-reference to literally hundreds of regulations in DCMR Title 12. It must timely provide Respondent with fair notice of exactly which provisions of law form the underlying basis for the

[6] 29 DCMR 327.5 states as follows: "Natural light and ventilation requirements of the Building Code (DCMR Title 12) shall be met in all child development facilities."

charge[7]. *E.g. DOH v. Ferguson*, OAH No. I-00-40305 at 1 (Order, January 25, 2001); *see also DOH v. Community Child Development Center*, OAH No. I-00-40222 at 2 (Final Order, October 3, 2000); *DOH v. Bridges Academy,* OAH No. I-00-40007 at 6 (Final Order, September 11, 2000). Because the Government did not provide such notice, this charge must be dismissed.

IV. Findings of Fact

Based upon the testimony of all the witnesses, the evaluation of their credibility, the documents introduced into evidence and the entire record in this matter, this administrative court finds the following facts by a preponderance of the evidence:

1. Respondent Brenda Smith was at all relevant times the owner and operator of a child development facility known as "Brenda's Day Care Home" at 4626 4th Street, NW in Washington, D.C. The child development facility was located in Respondent's home.
2. By her plea of Admit with Explanation, Respondent has admitted to a violation of 29 DCMR 318.1 by failing to properly protect and store food.
3. By her plea of Admit with Explanation, Respondent has admitted to a violation of 29 DCMR 306.1(b) by failing to comply with other federal or District laws and regulations governing open egress and ingress requirements within her child development facility.
4. Respondent has a history of non-compliance, as evidenced in the record. PX 1-4.

[7] Of course, a timely and proper motion to amend a notice of infraction to provide such information

5. Respondent notified the mothers of Qu'Ran Hughes and Nigel Payne in advance of her intent to change her operational hours by closing her child development facility on May 24, 2000.
6. Respondent did not inform the Department of Health in advance of her intent to change her operational hours by closing her child development facility on May 24, 2000.
7. It is uncontested and this administrative court finds that the following conditions existed at the time of the inspection of Respondent's facility on May 24, 2000 during its normal operating hours:[8]
    a. Several medication containers filled with pills and other bottles containing nail polish and hairspray were in or near Respondent's bedroom.
    b. Two children regularly enrolled in the child development facility, Qu'Ran Hughes and Nigel Payne, were sleeping in the Respondent's bedroom which was not a part of her approved program space. The children were in close proximity to the potentially hazardous materials identified in the previous paragraph 7a, and these materials were not secured.
    c. On May 24, 2000, Respondent had accurate parent contact forms which were signed by each child's mother on file for Qu'Ran Hughes and Nigel Payne. Each child's form provided a phone number and an address for Dunbar High School where the mothers were enrolled as students on May 24, 2000. RX-9.

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could ordinarily cure such a defect if the amendment is not unfairly prejudicial to the respondent.

[8] Respondent represents, and the administrative court finds, that the normal program operating hours for her child development facility during the period that included May 24, 2000 were 6:00 AM to 6:00 PM, Monday through Saturday. RX-9.

d. In responding to the charging inspector's request that Respondent contact Qu'Ran Hughes' and Nigel Payne's mothers, Respondent was unable to immediately reach them by phone because both Ms. Hughes and Ms. Payne were in class at a local high school and could not receive direct phone calls.

e. Neither Ms. Hughes nor Ms. Payne was known by Respondent to carry a cellular phone or pager. Respondent could, however, contact each of these mothers by telephoning the high school at the telephone number provided by each mother on their emergency contact forms. RX-9.

8. Respondent has not accepted responsibility for her unlawful conduct in as much as she has persisted in claiming that the charged regulatory lapses were permissible and acceptable behavior for a child care provider under the circumstances presented.

9. Respondent was out of town for a funeral for approximately 14 days around the time she was served with Notice of Infraction, and she responded to it promptly when she returned to Washington, D.C. on or about June 16, 2000. Respondent delivered her answer and plea to the Infraction Clerk's window in Office of Vital Records on June 17, 2000.

V. Conclusions of Law

A. Vacatur of the Default and Statutory Penalty for Untimely Answer Under D.C. Code § 6-2712

Respondent testified that she filed her answer on June 17, 2000. She asserts that for reasons unknown, the document was not transmitted to the OAH Docket Clerk for filing until June 27, 2000.[9] Respondent further testified that she was out of town for a funeral until June 16th and did not receive the Notice of Infraction until that date. She promptly delivered her answer to the Infraction Clerk's window in the Department of Health's Office of Vital Statistics on June 17, 2000. The Government has not challenged Respondent's factual contentions on this issue. Due to the relatively brief delay, the effort made to personally deliver the answer to the Infraction Clerk, and Respondent's credited testimony that she was out of town for a funeral, Respondent's default and the statutory penalty in the amount of $1,250.00 will be vacated for good cause shown. D.C. Code § 6-2712(f).

[9] The Infraction Clerk's window located within the Department of Health's Office of Vital Records functions as a court mail drop and is made available for the convenience of respondents. It is not under the direct control of the OAH Docket Clerk. Although rare, transmittal errors from the Office of Vital Records do occur on occasion. There was no contrary evidence or cross-examination offered by the Government on this issue and Respondent's testimony was credited. Findings of Fact at ¶ 9.

B. Infractions Denied

1. 29 DCMR 330.3–Failure to Keep Dangerous Substances Away from Children

Respondent does not contest that unsecured containers filled with medications, nail polish, and hairspray were present in or near her bedroom in physical proximity to Qu'Ran Hughes and Nigel Payne while they were in her care on May 24, 2000. Rather, she asserts that she was under no legal obligation to separate the children from these materials because she had declared her facility "closed" on that date. Thus, Respondent's liability for this infraction turns on whether or not she met the requirements for effecting a closure of a child development facility. As discussed below, Respondent did not meet these requirements and she is therefore liable for this infraction.

It is uncontested that Respondent notified all affected parents of her decision to "close" her facility on May 24, 2000. This, however, is insufficient under District of Columbia law to effect such a closure. To close a child development facility, a Respondent must comply with the requirements of 29 DCMR 304.4, which mandates that the facility must give the Department of Health advance notice of any material changes in programming.[10] *See*, *DOH v. Easter Seals Society, Inc.,* OAH No. I-00-40102 at 10 (Final Order, February 7, 2001) (holding that proper 29 DCMR 304.4 notice must be given to the Department of Health in advance for a closure or similar programming change to be effective). Respondent does not claim that she notified the

[10] 29 DCMR 304.4 states that "the licensee of a child development facility shall inform the [Department of Health] of any change in the operation, program or services of a child development facility of a degree or character which may affect its licensure."

Department of Health of her purported closure. Therefore, on May 24, 2000, she was, as a matter of law, operating as a fully regulated child development facility when she took responsibility for the care of Qu'Ran Hughes and Nigel Payne.

Moreover, even if Respondent had timely informed the Department of Health of her election to close on May 24, 2000, such notice only creates a rebuttable presumption of closure. By accepting responsibility for enrolled children on the date in issue, Respondent acted in a manner that is factually inconsistent with a closure. She accepted two children into her care for whom she was the regular licensed day care provider; she accepted them during her normal program hours; and she cared for them in a manner similar to other operational days. Under such circumstances, the children's mothers would not reasonably have expected that Respondent was operating her facility outside the reach of the District's regulatory system for protecting the health and safety of children in a day care. Indeed, it would be wholly unreasonable to believe that the two high school mothers who relied on Respondent to care for their children on May 24, 2000 believed that they had consented to place their infants in substandard and unregulated child care for the day.

Given that Respondent was fully subject to the health and safety regulations governing child development facilities on May 24, 2000, Respondent is liable for a violation of 29 DCMR 330.3. The medication containers, nail polish, and hairspray that were found in close proximity to the children on that date support this finding. Moreover, Respondent has not accepted responsibility for her unlawful conduct nor presented other evidence to support a mitigation of the fine. Accordingly, Respondent is liable for the entire fine in the amount of $500.00.

2. 29 DCMR 326.2–Failure to Maintain Current Contact Information

The Government charged Respondent with failing to maintain current contact information on the parents of children in her child development facility in violation of 29 DCMR 326.2. That section states that, "[e]ach facility shall maintain accurate and current information on where the parents or guardians of each infant or child may be reached at all times." 29 DCMR 326.2. The Government contends that Ms. Hughes and Ms. Payne could not be "*reached*" within the meaning of section 326.2 while attending their high school classes because Respondent had no direct telephone access to them in their classrooms throughout the day. In the Government's view, for Respondent to have complied with the subject regulation, Ms. Hughes and Ms. Payne would each have been obligated to carry a working cellular phone or pager, and provide Respondent with that telephone number. Respondent counters that she is not liable for this charge because she had accurate contact information for both Ms. Hughes and Ms. Payne at all relevant times. Respondent placed in evidence the completed emergency contact forms filled out by the two mothers. RX-9. These forms contained a daytime contact phone number and contact location for the mothers at Dunbar High School in the District. *Id.* None of this is disputed.[11]

While the charging inspector can be credited for the high standard she has attempted to set, the Government's argument regarding the requirements of 29 DCMR 326.2 does not reflect the legal requirements of that regulation. In construing a regulation, a court looks first to the plain meaning of words that are in issue. *In re Estate of James*, 743 A.2d 224, 227-228 (D.C.

[11] Findings of Fact at ¶ 7.

2000). Absent an ambiguity, the plain meaning is the beginning and the end of such an analysis. Applying that principle here, the word "reach" is defined as: "to succeed in getting in contact with or communicating with." Webster's Revised Unabridged Dictionary (1996). Thus for the purpose of section 326.2, a person who is capable of being contacted successfully is a person who can be "reached." The term does not connote or require the type of near-instantaneous access for which the Government has argued.[12] Nothing in record deomonstrates that Ms. Hughes and Ms. Payne could not be contacted successfully through the main number for Dunbar High School that the Respondent had available on the contact forms. RX-9.

If the Government's view of 29 DCMR 326.2 were correct, it would have broad and significant policy implications for parents across the socioeconomic spectrum who utilize regulated child care in the District of Columbia. It would mean that working parents ranging from courtroom lawyers, to surgical nurses, to security guards who work in an environment without direct phone access are obligated to carry a pager or cellular phone at all times during the business day. That impact would be even more pronounced for young mothers, such as the ones at issue in this case, who are compelled to attend school by law, and who may be without the means to afford such technology. *See,* 29 DCMR 5800 (mandating school attendance for teenage mothers receiving public assistance under the Temporary Assistance to Needy Families (TANF) Program). To be sure, the Council and the Department of Health (through regulatory delegation) ordinarily have the authority to impose such a sweeping requirement as an exercise of governmental police power. There is no evidence, however, that they have done so through section 326.2. Putting aside the subject regulation's plain meaning as construed above, it would

[12] The use of the phrase "at all times" to modify the word "reached" in section 326.2 provides no basis to vary this holding. Nothing about that phrase requires near-instantaneous access to the parent. The phrase only means that the information provided must allow for reasonable access to the parent at all times when the child is in the facility's care.

be unreasonable to find that a policy with such a wide-ranging impact was implemented tacitly through a relatively obscure provision of DCMR Title 29 that predates the current popularity and ubiquity of cellular phones and pagers. *See*, *United States v. American Trucking Ass'n,* 310 U.S. 534, 543-44 (1940) (courts should avoid unreasonable and futile constructions); *accord, Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc.*, 746 F.2d 126 (2nd Cir. 1984). This administrative court cannot unilaterally find such a requirement absent a clear expression of legislative or regulatory intent. No such intent is discernible in the regulation at issue or its enabling legislation,[13] and therefore the Government's position cannot prevail.

In sum, the Respondent knew where the parents could be found in case of an emergency and had contact information upon which she could reasonably rely. This was sufficient to satisfy the requirements of the subject regulation. Accordingly, Respondent is not liable for the charged violation of 29 DCMR 326.2.

C. Infractions Admitted with Explanation

1. 29 DCMR 306.1 – Failure to Comply with Other Federal and D.C. Laws[14]

This charge arose in connection with the Government's allegation that Respondent failed to provide clear means of ingress and egress between rooms within her facility. Respondent

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[13] *See* D.C. Code §§ 6-3601, *et seq.*

[14] The requirements of D.C. Code § 6-2711(b) are not in issue with regard to this charge or the charge under 29 DCMR 318.1 in light of Respondent's plea of Admit with Explanation. *See DOH v. Bridges Academy,* OAH No. I-00-40007 at 3, n.5 (Final Order, September 11, 2000).

entered a plea of Admit with Explanation to this infraction. Respondent acknowledged that a safety gate and a highchair blocked the means of egress from the kitchen to the program area. In her written submission, Respondent asserts that this infraction was improperly charged because she was closed on the day of inspection. For the reasons stated in section V-B-1 of this Order, this argument is unpersuasive and will be accorded no weight in assessing Respondent's request for an adjustment of the specified fine.

Further, the record does not support Respondent's request for a reduction or suspension of the fine. Respondent has not accepted responsibility for her unlawful conduct and has a history of non-compliance as evidenced in the four Statements of Deficiencies issued from July 21, 1999 to May 24, 2000. PX 1-4. Accordingly, a reduction is not warranted on this record and Respondent is liable for the specified fine in the amount of $500.00. D.C. Code § 6-2703(b)(6). *See also,* 18 U.S.C. § 3553; U.S.S.G. § 3E1.1.

2. 29 DCMR 318.1 – Failure to Properly Protect and Store Food

The Government alleges that Respondent failed to properly cover food in her refrigerator in violation of 29 DCMR 318.1. Although she entered a plea of Admit with Explanation to this infraction, Respondent asserts that the regulation does not apply to her because she was closed on the date of inspection. Respondent also asserts that the inspector failed to issue a Notice of Infraction for this type of violation during prior visits, and that she was unaware of the fact that her daughter had left uncovered food in the refrigerator. Here again, Respondent has failed to accept responsibility for her unlawful conduct. Even if Respondent's claim about the

Government's prior exercise of prosecutorial discretion is correct (an issue I need not decide), it only underscores her history of non-compliance. In sum, Respondent has not accepted responsibility for her unlawful conduct and she has a demonstrated history of non-compliance as evidenced by PX 1-4. D.C. Code § 6-2703(b)(6). *See also* 18 U.S.C § 3553; U.S.S.G. § 3E1.1. Accordingly, no downward adjustment is warranted and the Respondent is liable for the specified fine in the amount of $100.00.

VI. Order

Now, therefore, this _____ day of _____, 2001, it is

ORDERED, that having demonstrated good cause to excuse the failure to timely respond to Notice of Infraction No. 00-40049, the default order and its statutory penalty of $1250.00 are hereby **VACATED**; and it is further

ORDERED, that a fine of $1,100 is imposed for the violations at issue in this matter as shown below:

Infraction	Fine Sought	Fine Imposed
29 DCMR 318.1	$100.00	$100.00
29 DCMR 326.2	$50.00	Not Liable
29 DCMR 327.5	$100.00	Dismissed
29 DCMR 306.1(b)	$500.00	$500.00
29 DCMR 330.3	$500.00	$500.00
TOTAL	**$1,250.00**	**$1,100.00**

and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real or personal property owned by Respondent pursuant to D.C. Code § 6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ 8/31/01

Paul Klein
Chief Administrative Law Judge